Office-Supreme Court, U.S.
FILED
JUN 27 1969
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 40

JAMES CONWAY,

Petitioner,

vs.

CALIFORNIA ADULT AUTHORITY, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

CHARLES STEPHEN RALSTON
1095 Market St., Suite 418
San Francisco, California 94103
Attorney for Petitioner

INDEX

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	5
Summary of Argument	9
ARGUMENT:	
Introduction: The Statutory Scheme of the California Indeterminate Sentence Law	12
I. The Revocation of Petitioner's Two 5-Year Sentences Without Proper Cause Denied Him Due Process of Law	19
A. The Action of the Adult Authority in Revoking the Sentence It Had Determined Was Subject to the Due Process Clause	19
B. The Revocation of the Prior Order Setting a Sentence for No Reason or Because Petitioner Wished to Clear His Name Violated Due Process	23
C. If the Adult Authority Revoked Petitioner's Two Prior Terms for a Reason of Which It Gave Him No Notice and No Opportunity to Be Heard, Petitioner Was Denied Due Process of Law	27

Page

II. The Increase of Petitioner's Sentences Violated His Right Under the Fourteenth Amendment to Be Free of Double Jeopardy 31

A. The Action of the Adult Authority Violated Long Standing Double Jeopardy Principles 32

B. The Rule Against Double Punishment Applies to Petitioner's Case Through the Due Process Clause of the Fourteenth Amendment 37

Conclusion 39

Table of Authorities Cited

CASES:

Bartkus v. *Illinois*, 359 U.S. 121 (1959) 37
Benton v. *Maryland*, Oct. Term 1968, No. 201 37
Bozza v. *United States*, 330 U.S. 160 (1947) 33
Brock v. *North Carolina*, 344 U.S. 424 (1953) 37
Burns v. *United States*, 287 U.S. 216 (1932) 20, 21, 24
Butler v. *District of Columbia*, 346 F.2d 798 (D.C. Cir. 1965) 26
Carafas v. *LaVallee*, 391 U.S. 234 (1968) 25
Chin Yow v. *United States*, 208 U.S. 8 29
Dixon v. *Alabama State Board of Higher Ed.*, 294 F.2d 150 (5th Cir. 1961) 29
Duggins v. *United States*, 240 F.2d 479 (6th Cir. 1957) 34
Escoe v. *Zerbst*, 295 U.S. 490 (1935) 20
Exberg v. *United States*, 167 F.2d 380 (1st Cir. 1948) 34
Ex parte Lange, 85 U.S. 163 (1874) 11, 32, 33, 34, 35, 38
Ex parte Quinn, 25 Cal.2d 799, 154 P.2d 875 (1945) 17

Page

Ex parte Smith, 33 Cal.2d 797, 205 P.2d 662 (1949) 15

Fleenor v. *Hammond*, 116 F.2d 982 (6th Cir. 1941) 20, 21

Green v. *United States*, 355 U.S. 184 (1957) 26

Hetenyi v. *Wilkins*, 348 F.2d 844 (2d Cir. 1965) 38

Hyser v. *Reed*, 318 F.2d 225 (D.C. Cir. 1963) 31

In re Benz, 282 U.S. 304 (1931) 11, 32, 33, 34, 35, 38

In re Bradley, 318 U.S. 50 (1943) 33, 34

In re McClain, 55 Cal.2d 78, 9 Cal. Rptr. 824, 357 P.2d 1086 (1960) 15, 21, 28

In re Sandel, 64 Cal.2d 412, 50 Cal. Rptr. 462, 412 P.2d 806 (1966) 17

In re Schoengarth, 66 Cal.2d 295, 57 Cal. Rptr. 600, 425 P.2d 200 (1967) 21, 28

Japanese Immigrant Case (Yamataya v. *Fisher)*, 189 U.S. 86 29

Kennedy v. *United States*, 330 F.2d 26 (9th Cir. 1964) 34

Mempa v. *Rhay*, 389 U.S. 128 (1967) 9, 10, 20, 29, 30, 31

Oxman v. *United States*, 148 F.2d 750 (8th Cir. 1945) 34

Palko v. *Connecticut*, 302 U.S. 319 (1937) 11, 37, 39

Patton v. *North Carolina*, 381 F.2d 636 (4th Cir. 1967) 11, 26, 34, 38, 39

People v. *Ferlin*, 203 Cal. 587, 265 P. 230 (1928) 16

People v. *Harmon*, 54 Cal.2d 9, 4 Cal. Rptr. 161, 351 P.2d 329 (1960) 16

People v. *Kostal*, 159 Cal. App.2d 444, 323 P.2d 1020 (1958) 17

Phillips v. *Biddle*, 15 F.2d 40 (8th Cir. 1926) 34

Schultz v. *United States*, 384 F.2d 374 (5th Cir. 1967) 33

Page

Slochower v. *Board of Higher Education*, 350 U.S. 551 29
Smartt v. *Avery*, 370 F.2d 788 (6th Cir. 1967) 10, 25, 26
Springer v. *United States*, 148 F.2d 411 (9th Cir. 1945) 26
Sturm v. *California Adult Authority*, 395 F.2d 446 (9th Cir. 1968) 17-18, 20, 21, 22
Thorpe v. *Housing Authority of the City of Durham*, 393 U.S. 268 (1969) 29
Townsend v. *Burke*, 334 U.S. 736 (1948) 9, 10, 19, 20, 30
United States v. *Adams*, 362 F.2d 210 (6th Cir. 1966) 34
United States v. *Jackson*, 390 U.S. 570 (1968) 27
United States v. *Sacco*, 367 F.2d 368 (2d Cir. 1966) 11, 33, 35
Williams v. *New York*, 337 U.S. 241 (1949) 20
Willner v. *Committee on Character & Fitness*, 373 U.S. 96 29
Wong Yang Sun v. *McGrath*, 339 U.S. 33 29

STATUTES:

28 U.S.C. § 1291 2
28 U.S.C. § 1651(a) 2
28 U.S.C. § 2241(c)(3) 2
28 U.S.C. § 2253 2

California Penal Code:

§ 211 ..... 5, 15
§ 213 ..... 3, 5, 15, 19
§ 671 ..... 3, 5, 15
§ 1168 ..... 4, 5, 6, 12, 13, 14, 15
§ 3020 ..... 4, 6, 14

Cal. Stats. 1917, c. 527, p. 665 ..... 4, 12
Cal. Stats. 1929, c. 872, p. 1930 ..... 4, 13
Cal. Stats. 1931, c. 483, p. 1053 ..... 4, 13
Cal. Stats. 1937, c. 543, p. 1555 ..... 4, 14
Cal. Stats. 1941, c. 106, pp. 1083, 1110 ..... 4, 5, 14

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 974

JAMES CONWAY,

Petitioner,

vs.

CALIFORNIA ADULT AUTHORITY, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The order of the United States District Court for the Northern District of California denying petitioner's amended petition for writ of habeas corpus is unreported and appears in the Appendix (hereafter cited A.) at page 20. The order of the United States Circuit Judge Richard A. Chambers denying petitioner's application for a certificate of probable cause to appeal the denial of the petition for writ of habeas corpus is also unreported. It appears at A. 27.

Jurisdiction

Jurisdiction of the District Court was conferred by 28 U.S.C. §2254(a)(3). Jurisdiction of the Court of Appeals was sought to be invoked under 28 U.S.C. §§1291 and 2253. The jurisdiction of this Court rests upon 28 U.S.C. §1254(a) since review is sought of the denial of an application for a certificate of probable cause. The judgment of Judge Chambers of the Court of Appeals was entered on February 7, 1968 (A. 27). The petition for writ of certiorari was filed in this Court on May 6, 1968, and was granted on January 27, 1969 (A. 28).

Questions Presented

Petitioner was convicted of two counts of robbery in the first degree in 1961. Under California law he was sentenced to two indeterminate sentences, to be served consecutively, with a minimum term of five years. In 1967 the California Adult Authority, pursuant to California law, set his sentences at two 1-year terms to run concurrently and to terminate on March 14, 1962. In 1961 the Adult Authority, after hearing from petitioner that he wished to clear his name of the crimes of which he was convicted, revoked the two 1-year terms, thus reinstating the two consecutive indeterminate sentences.

1. Was petitioner denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States in that the California indeterminate sentence law permits the Adult Authority complete and arbitrary power to revoke and reset sentences for no reason or for an invalid reason?

2. Were petitioner's sentences revoked and reset for a constitutionally invalid reason in violation of his right to due process of law?

3. Does the failure of the California indeterminate sentence law to provide a defendant with any procedural protection, including notice and hearing, before a sentence may be reset violate the due process clause of the Fourteenth Amendment to the Constitution?

4. Did the action of the California Adult Authority in increasing petitioner's sentences after they had been set at two definite 5-year terms and after he had commenced serving both of the terms violate the Fifth and Fourteenth Amendment protection against double jeopardy?

Constitutional and Statutory Provisions Involved

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States. This case also involves the following provisions of the California Penal Code:

Section 213. Punishment. Robbery is punishable by imprisonment in the state prison as follows:

1. Robbery in the first degree, for not less than five years.

[Omitted from Appendix: As amended Stats. 1923, c. 126, p. 254, § 1.]

Section 671. Life Imprisonment Where No Maximum Term Prescribed. Whenever any person is declared punishable by a court by imprisonment in the state prison for a term not less than any specified number

of years, and no limit to the duration of such improvement as declared, punishment of such offender shall be imprisonment during his natural life subject to the provisions of Part 3 of this Code. (Enacted 1872. As amended Stats. 1951, c. 1674, p. 3839, § 1.)

Section 1168. Sentence to Imprisonment in State Prison; Duration Not to Be Fixed. Every person convicted of a public offense, for which imprisonment in any reformatory or state prison is now prescribed by law shall, unless such convicted person be placed on probation, a new trial granted, or the imposing of sentence suspended, be sentenced to be imprisoned in a state prison, but the court in imposing the sentence shall not fix the term or duration of the period of imprisonment. (Added Stats. 1917, c. 526, p. 965, § 1. As amended Stats. 1927, c. 708, p. 1491, § 1; Stats. 1929, c. 872, p. 1930, § 1; Stats. 1931, c. 483, p. 1061, § 1; Stats. 1933, c. 814, p. 2150, § 1; Stats. 1935, c. 601, p. 1691, § 1; Stats. 1937, c. 340, p. 1055, § 1; Stats. 1941, c. 106, p. 1083, § 13; Stats. 1943, c. 1056, p. 3017, § 1; Stats. 1947, c. 530, p. 1507, § 1.)

Section 1168. Adult Authority to Fix Length of Term. In the case of all persons heretofore or hereafter sentenced under the provisions of Section 1168 of this code, the Adult Authority may determine and

redetermine, after the expiration of six months, from and after the actual commencement of imprisonment, what length of time, if any, such person shall be imprisoned, unless the sentence be sooner terminated by commutation or pardon by the Governor of the State; provided, however, that where the maximum sentence is for five years or less, such determination may be made by the Adult Authority after a period of 90 days. (Added Stats. 1941, c. 106, p. 1110, § 15.[1] As amended Stats. 1953, c. 722, p. 1988, § 1; Stats. 1957, c. 2256, p. 3934, § 54; Stats. 1963, c. 1792, p. 3344, § 1.)

Statement

On March 5, 1962, petitioner was convicted in the Superior Court of Kern County, California, of two counts of first degree robbery in violation of California Penal Code, § 211. Pursuant to Section 1168 of the Penal Code, he was sentenced to the state prison for the "term prescribed by law." The sentences for the convictions were to be served consecutively. (A. 8).

Section 213 of the Penal Code prescribes that robbery in the first degree is punishable by an imprisonment of not less than five years, but prescribes no maximum term. Section 671 of the Penal Code provides that where no maximum term is set then punishment shall be imprisonment during the natural life of the defendant subject to the provisions of part 3 of the Penal Code. Part 3 of the Penal

[1] The statute is given as it read at the times involved in this case. The 1963 amendment eliminated the language providing for waiting periods before determination, viz. "after the expiration of six months from and . . ." and the last clause beginning with "provided . . ."

Code includes § 3020 which vests in the Adult Authority the duty to "determine and redetermine" what length of time a person sentenced under § 1168 shall be in prison. On January 29, 1959, petitioner appeared before the Adult Authority for parole consideration (A. 9).[1] Petitioner had noticed that persons who were serving life sentences and who admitted their guilt before the Parole Board had been discharged or paroled. Therefore, when he appeared before the Authority for consideration in 1959, he, in his own words, "pleaded guilty" (A. 14) to the crimes for which he was convicted in 1952; that is, he stated to the Adult Authority that he was guilty of the crimes. Although parole was denied the Adult Authority did fix petitioner's prison terms at five years on each count of "robbery," to be served consecutively. Under this determination the sentence would end on March 14, 1962.

On June 15, 1961, petitioner appeared before the Adult Authority for another parole consideration. During the conversation petitioner was asked where he planned to go when he was discharged from the prison. Petitioner replied: "To Bakersfield." An Authority board member objected, saying that, "but that is where you got into this trouble. What are you planning to do there?" Petitioner replied: "I'm going to fight my case." Another Authority member asked whether the petitioner had told them that he was guilty of the crimes he was charged with. Petitioner denied that he was guilty. It was only after this conversation that any intention to increase petitioner's prison term was mentioned (A. 9, 14-15).

[1] From 1953 onward, petitioner had appeared before the Adult Authority for parole consideration each year. The parole was denied each time.

Members of the Authority then told petitioner that the Authority was agreeable to releasing him on parole but wanted him on parole for a longer period than the eight months left until March 14, 1962, when his prison term would expire. They asked petitioner to suggest what increase should be made in his sentence to allow for a longer term of parole. Petitioner objected to any increase in his sentence; he told the members of the Authority that he would be willing to serve the eight months remaining on parole, but indicated that rather than having any increase made, he would prefer to serve out the eight months left in prison (A. 151).

Subsequently, the Adult Authority rescinded its action of January 29, 1959, fixing his terms of imprisonment at five years for each conviction, with an aggregate of ten years. No new term was fixed by the Adult Authority. No reason was given for the refixing of the sentences and no notice or hearing was given before the sentences were refixed other than as described above. On May 28, 1961, petitioner was again summoned by the Adult Authority for further parole consideration. Petitioner, however, refused to appear, taking the position that his two 5-year sentences as fixed on January 29, 1959, had expired and he was entitled to be discharged (A. 9-10). He has been in prison since, more than seven additional years.

Petitioner filed applications for writ of habeas corpus in the Superior Court of the State of California and in the California Supreme Court raising substantially the same constitutional challenges to the redetermination of the sentences as are involved in this case. Both applications were denied without hearing (A. 10-11). A petition for writ of certiorari was filed in this Court on December 21, 1961,

to review the California denial of the petition for habeas corpus. This petition was denied on May 16, 1966 (A. 13). On August 31, 1966, petitioner filed a second petition for writ of habeas corpus in the Supreme Court of California, again urging that the Adult Authority rescinded its order of January 29, 1959, for no valid cause. This petition was similarly denied without a hearing (A. 13-14). November 28, 1966, a second petition for writ of certiorari was filed in this Court to review the second denial of habeas corpus by the California Supreme Court. This petition was denied on February 13, 1967.

On August 25, 1967, the present proceeding was begun by filing a petition for writ of habeas corpus in the United States District Court for the Northern District of California. The petition, which was in two parts, raised substantially the same issues that were raised in the state courts (A. 4, 15-16). On August 24, 1967, the petition was denied for technical reasons, with leave to amend. A motion was filed by petitioner on September 8, 1967, which was treated as an amended petition by the district court. This amended petition was denied on the merits without a hearing on September 27, 1967. The ground for denying the amended petition was that no federal questions were involved in petitioner's attack on the constitutionality of California indeterminate law. Subsequently, petitioner filed a petition for a certificate of probable cause with the district court in order to allow him to appeal to the Ninth Circuit (A. 21). The petition for probable cause was denied by the district court on October 31, 1967 (A. 21). On December 14, 1967, petitioner filed with the Court of Appeals for the Ninth Circuit a document entitled "Affidavit" (A. 21-26). Judge Richard A. Chambers treated the affi-

davit as an application for a certificate of probable cause to take an appeal to the Ninth Circuit and denied the application on the merits for the same grounds on which the district court based its denial of the petition for habeas corpus and the application for certificate of probable cause, viz., that no federal question was raised by the challenge to the indeterminate sentence law (A. 27). Subsequently, petitioner filed a petition for writ of certiorari in this Court, which writ was granted on January 27, 1969. In all the proceedings set out above, both in state and federal courts, petitioner acted on his own behalf without benefit of counsel.

Summary of Argument

The California indeterminate sentence law has for constitutional purposes removed the actual sentencing function from the state judge and has vested it in an administrative agency, the Adult Authority. Where, as here, the penal code establishes a fixed minimum but no maximum term of imprisonment only the Adult Authority may make the determination of the actual sentence to be served. Therefore, the Adult Authority imposed the actual sentenced involved here on petitioner.

I.

A.

The sentencing procedure, including the revocation of a sentence once pronounced, is subject to due process. *Townsend v. Burke*, 334 U.S. 736 (1948); *Mempa v. Rhay*, 389 U.S. 128 (1967). Therefore a sentencing authority cannot act arbitrarily or on whim or caprice when it re-

vokes a sentence. This means, at the least, that there must be some valid reason for a revocation.

B.

The only reason for revocation apparent on the record here, the fact that petitioner wished to return to the place of his conviction and establish his innocence, was not constitutionally valid. The right to prove one's innocence is basic to our scheme of justice, and the state cannot force its surrender directly or indirectly. The Adult Authority's revocation of the terms it set because of petitioner's intention to establish his innocence in effect conditioned his gaining of his freedom by a surrender of a substantial right. This was not constitutionally permissible. *Smartt v. Avery*, 370 F.2d 788 (6th Cir. 1967).

C.

No other reason other than that set out above appears for the action of the Adult Authority. If there was some other reason for its action it was a denial of due process not to give petitioner notice of it, an opportunity to be heard, and other constitutional guarantees before the action was taken. *Mempa v. Rhay*, 389 U.S. 128 (1967); *Townsend v. Burke*, 334 U.S. 736 (1948).

II

Independent of the arguments set out above, it was a denial of due process of law and of the right to be free of double jeopardy for the Adult Authority to increase petitioner's sentence after it had set a definite term of imprisonment.

A.

A long line of authority clearly establishes that for a sentencing authority to increase a sentence after it has been begun to be served imposes double punishment in violation of the constitutional guarantee against double jeopardy. *Ex parte Lange*, 85 U.S. 163 (1874); *In re Bonz*, 282 U.S. 304 (1931); *United States v. Sacco*, 367 F.2d 368 (2d Cir. 1966). This is the case even where the original sentence was due to an error, and the increase is within the maximum that could have been imposed.

Petitioner's case falls squarely within this line of authority. His sentence was fixed at a definite term by the sentencing authority. That authority increased it after one sentence had terminated and after he had served all but eight months of his second term.

B.

Petitioner's rights have been denied under the due process clause either because the Fifth Amendment's guarantee against double jeopardy has been incorporated into the Fourteenth Amendment, or because double punishment for one conviction violates basic notions of justice. This Court should rule that the Fourteenth Amendment incorporates the Fifth Amendment's protection against double jeopardy as a fundamental right. *Patton v. North Carolina*, 381 F.2d 636 (4th Cir. 1967). However, even if the Fifth Amendment protection is not incorporated *in toto*, it is clear that due process does include protection against certain aspects of double jeopardy. *Palko v. Connecticut*, 302 U.S. 319 (1937). The right to be free of double punishment is basic to notions of due process, as evidenced by the long and consistent line of cases in this Court and in the circuits so holding.

ARGUMENT

Introduction

The Statutory Scheme of the California Indeterminate Sentence Law

In order to place the constitutional issues involved in this case in the proper perspective, it will be necessary, first, to briefly outline the history and operation of the California indeterminate sentence law, both as set out in the statutes and as interpreted by the California courts.

The California indeterminate sentence law was originally passed in 1917 by adding Section 1168 to the California Penal Code. Cal. Stats. 1917, c. 527, p. 665. The statute removed from the judge in a criminal case the power and duty of fixing the term or duration of imprisonment following conviction. Rather, the judge was only to sentence the defendant to be imprisoned in the state prison for the term established by law. This had the effect of sentencing the defendant to a term of a minimum and maximum depending on what the Penal Code provided for the particular crime involved. It then became the duty of the governing authority of the prison to determine what further length of time, if any, above the minimum term of imprisonment the defendant would be confined, unless the sentence was sooner ended by commutation or pardon by the Governor. The statute provided specifically that the period of the confinement would not exceed the maximum or be less than the minimum term of imprisonment provided by the law. It further provided that it was the duty of the judge and district attorney involved in the prosecution to send to

the state board of prison directors all possible information regarding the career, habits, education, age, etc., of the defendant for the board's use in determining the actual length of time to be served. The statute has been amended on a number of occasions. However, only certain of those amendments are of concern here.

In 1929, Section 1168 was amended by Cal. Stats., c. 874, p. 1930, which specifically provided that after the state board of prison directors, who now had the power to determine the length of sentence, had determined the number of years to be served, "the term of imprisonment so fixed by the state board of prison directors, shall not thereafter be increased or diminished by said board for any reason whatsoever except as in this section provided." *Id.* at 1931. The statute went on to provide a means for calculating credit for good time, which could be earned, and had a specific provision for the forfeiting of good credit if the convict committed an assault or violated prison rules or regulations and for other reasons. The statute specifically provided that forfeitures could be made only by the state board of prison directors "after due proof of the offense and notice to the offender." *Id.* at 1933.

In 1931, in Cal. Stats., c. 483, p. 1053, Section 1168 was again amended. The power to determine the actual length of time to be served was still vested in the state board of prison directors. However, the specific prohibition against increasing or decreasing sentences was removed. Instead, the statute was amended to allow the revocation of a determination of sentence for certain specific reasons. These included infractions of rules and regulations and conduct. However, no revocation and redetermination could be made

except after a hearing.[4] The provisions for redetermining sentences were kept substantially the same for a number of years. In 1937, in Cal. Stats., c. 543, p. 1555, the language was changed to read that the board "may determine and redetermine" the term of sentence after the expiration of the minimum term of sentence provided by law. The provision cited above, however, allowing revocation only in cases where prison rules have been infracted or an escape has occurred and providing procedural protections before such a revocation is ordered, was retained.

The substantial departure from this language came in 1941 with the passage of Cal. Stats., c. 106, p. 1110. The California legislature removed the provisions for determination of sentence from Section 1168 and enacted a new Section 3020, et seq. of the Penal Code. Section 3020 now read that the board "may determine and redetermine" the length of time a person sentenced under Section 1168 of the Code would serve. Omitted were the provisions which

[4] The text of the provision was as follows:

> In case any convicted person undergoing sentence in any of the state prisons commits any infraction of the rules and regulations of the prison board, or escapes while working outside such prison under the surveillance of prison guards, the board of prison directors may revoke any order theretofore made determining the length of time such convicted person shall be imprisoned, and make a new order determining such length of time not exceeding the maximum penalty provided by law for the offense for which he was convicted, unless the sentence be sooner terminated by commutation or pardon by the governor of the state. Such revocation and redetermination shall not be had except upon a hearing upon the question of such infraction or escape and an adjudication by the board that such prisoner was guilty thereof, which adjudication shall be final. At such hearing such prisoner, unless outside the walls of the prison as an escape and fugitive from justice, shall be present and entitled to be heard and may present evidence and witnesses in his behalf. *Id.* at 1054.

specified the basis for revoking a prior determination and which provided procedural protections before such a revocation could take place. In 1949 the California Supreme Court specifically pointed to these omissions and held that as a result there was no longer a right to a hearing or notice before a term of sentence is either set or revoked. Rather, the board (which became the California Adult Authority by an amendment to the Code in 1957) could determine and redetermine the sentence apparently at will as long as the prisoner was in custody. *Ex parte Smith,* 33 Cal.2d 797, 205 P.2d 662 (1949). In 1961 the California Supreme Court modified this rule somewhat by holding that while there was a broad power to redetermine sentences "good cause must in fact exist for the making of such an order." A redetermination could not be based on "mere whim, caprice, or rumor." *In re McClain,* 55 Cal. 2d 78, 87, 9 Cal. Rptr. 824, 357 P.2d 1086 (1960). However, no specific procedural protections were read back into the statute by the holding in *McClain.* Rather, the holding in *Ex parte Smith* that the 1941 amendments removed the notice and hearing requirement and that no new ones were imposed by the Constitution was reaffirmed.

Petitioner was found guilty of two counts of robbery in the first degree (California Penal Code, § 211). Section 1168 of the Penal Code required the judge to sentence merely to the term required by law and not to any fixed term. Penal Code § 213 provides that robbery in the first degree is punishable by imprisonment in a state prison for not less than five years. No maximum is specified in that statute. However, Penal Code § 671 states that where no limit to the duration of imprisonment is declared, the punishment "shall be imprisonment during his natural life

subject to the provisions of Part 3 of this Code." Part 3 of course includes Section 3020, which gives the Adult Authority the power to determine and redetermine the actual sentences.

As early as 1928 the California Supreme Court held that Section 1168, the indeterminate sentence law, " . . . divested the trial court of any discretion in fixing the exact term of imprisonment, and has vested such discretion in the board of prison directors within the limits prescribed by the Penal Code." *People* v. *Ferlin,* 203 Cal. 587, 603, 265 P. 230, 237 (1928). Thus, the only act the judge is empowered to do is to sentence a defendant to the state prison for "the term provided by law." [5]

Where, as here, there is a minimum sentence but no fixed maximum, the effect of the judge's act is to impose a wholly indeterminate sentence with no upper limit. The Adult Authority alone has the power of actually fixing the sentence, which it may do either by sentencing to a term of years or not acting, which results in a life sentence. See *People* v. *Harmon,* 54 Cal.2d 9, 4 Cal. Rptr. 161, 351 P.2d 329 (1960). Thus, the California Supreme Court has recognized that although an indeterminate sentence without a fixed maximum can be regarded as a life sentence for some purposes, the reality is that:

> . . . in the absence of action by the board, an indeterminate sentence *is an indeterminate sentence.* It is neither a life sentence nor a fixed term sentence; it is entitled to recognition as a distinct *species intelligibilis.*

---

[5] This assumes, of course, that the court decides on imprisonment rather than probation or suspension of the sentence.

> The fact that for some purposes it has the legal effect of a life sentence does not mean that it must be regarded as the equivalent of a life sentence for all purposes. . . . A defendant against whom such a sentence has been pronounced may or may not be required to spend the entire term of his natural life in prison. *Ex parte Quinn,* 25 Cal.2d 799, 801, 154 P.2d 875, 876 (1945).

See also *People* v. *Kostal,* 159 Cal. App.2d 444, 323 P.2d 1020, 1027 (1958).

It is therefore clear that, at least in a case such as petitioner's where there is a minimum and no maximum sentence, the California indeterminate sentence law has removed from the judge the sentencing function. Rather, the Authority has and exercises the actual sentencing power which would otherwise be exercised by a court. Once petitioner was found guilty of the crimes of which he was charged the court had merely the ministerial function of sending him to the penitentiary. By statute the term was at least five years with the actual length of time to be served in excess of that to be decided by the Adult Authority. Thus, it in truth imposed sentence on him in 1959.

The California Supreme Court has sought to interpret this statutory scheme to avoid the issue of separation of powers by saying that the Adult Authority's determination of the length of time was not part of the imposition of sentence. *In re Sandel,* 64 Cal.2d 412, 50 Cal. Rptr. 462, 412 P.2d 806 (1966). However, the reality for constitutional purposes of the California system has been accurately characterized by Judge Browning of the Ninth Circuit in a concurring opinion in *Sturm* v. *California Adult Authority,*

395 F.2d 446 (9th Cir. 1968). That case, as does this one, involved a conviction for first degree robbery, sentences according to law, and consequently indeterminate sentences with a minimum of five years and a possible maximum of life. Judge Browning said:

> [J]udicial imposition of a life sentence upon appellant is no more than a legislatively mandated device for transferring the sentencing function from the State court to the State administrative agency with a grant of jurisdiction over appellant's person for a period sufficiently long to enable the agency to perform its functions under the State's indeterminate sentencing law. Use of that device cannot be seized upon as a means to validate whatever action the administrative agency might subsequently choose to take, no matter how seriously the appellant might be injured, and without regard to whether the agency's action was arbitrary, basically unfair, or invidiously discriminatory. 395 F.2d at 449.[6]

The constitutional issues raised by petitioner in this case will be discussed in the context of this assessment of the California indeterminate sentencing law. Part I of the argument will assume, for the sake of argument, that under some circumstances the Adult Authority could constitutionally increase a sentence it had fixed. Part II takes the position, on the other hand, that such an action could not be taken under any circumstances consistent with the protection against double jeopardy.

---

[6] Judge Browning concurred in the denial of habeas corpus solely on the ground that no showing had been made that the redetermination was arbitrary.

I.

The Revocation of Petitioner's Two 5-Year Sentences Without Proper Cause Denied Him Due Process of Law.

A. The Action of the Adult Authority in Revoking the Sentence It Had Determined Was Subject to the Due Process Clause.

As has been shown, the statute under which the California indeterminate sentencing system functions had the effect of imposing on petitioner two consecutive indeterminate terms of a minimum of five years with the upper limit to be set by the Adult Authority. The absence of a fixed minimum in Penal Code § 213 resulted in a possible maximum of life imprisonment. However, under California law the Adult Authority exercises the actual sentencing power and decides the specific term of years to be served.

The respondent, in his response to the petition for writ of certiorari, has argued, in effect, that the Authority has virtually unlimited power to perform its duty in whatever way it sees fit. It may set and reset sentences as it wishes, apparently subject to no controls or standards. Petitioner urges that this contention be rejected. Rather he contends that the Adult Authority cannot, consistently with the due process clause of the Constitution, be said to have a vague, unreviewable, and unchallengeable power to act arbitrarily and capriciously.

This Court has held that the sentencing process, whether exercised by state or federal authorities, is subject to scrutiny under the due process clause. Thus, *Townsend* v. *Burke,* 334 U.S. 736 (1948), struck down a sentence

imposed by a state judge as a result of a mistaken assessment of the defendant's past criminal record by the judge in the absence of defense counsel. A sentence so grounded was held to be "inconsistent with due process of law" (334 U.S. at 741), even though it was within the maximum that could have been imposed by law. And see *Williams* v. *New York,* 337 U.S. 241, 252 n. 18 (1949).

Just as the initial setting of a sentence must be done consistent with due process, so necessarily must subsequent action with regard to that sentence. This is the case whether such later action be viewed as the setting of a deferred sentence, *Mempa* v. *Rhay,* 389 U.S. 128 (1967); the revocation of probation, *Burns* v. *United States,* 287 U.S. 216 (1932); or the revocation of a conditional pardon by a governor, *Fleenor* v. *Hammond,* 116 F.2d 982 (6th Cir. 1941). And, *cf. Escoe* v. *Zerbst,* 295 U.S. 490 (1935).

The reason for these decisions is clear. The action of the court or agency, here the Adult Authority, is state action. Its effect was to deprive the defendant of liberty. If the action was taken without due process of law, it violated the Fourteenth Amendment. See *Sturm* v. *California Adult Authority,* 395 F.2d 446, 449 (9th Cir. 1968) (concurring opinion of Judge Browning).

Moreover, in the above cases the argument that the act of the sentencing or probating authority was one of grace and hence could not be questioned was specifically rejected. Thus, in *Burns* v. *United States,* this Court held that the question could be raised as to whether there had been an abuse of discretion and said:

> . . . the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice. 287 U.S. at 223.

And, in *Fleenor* v. *Hammond,* the Sixth Circuit, while acknowledging that a pardon is an act of grace and could be granted subject to certain conditions and revoked if those conditions were broken, held that the power could not be exercised "arbitrarily or upon whim, caprice, or rumor." 116 F.2d at 986.

Thus, the issues presented by this case cannot be dismissed by characterizing the action of the Adult Authority in setting petitioner's terms as an act of grace, or by arguing that petitioner has no "vested right" in the five year terms that were set, or by pointing out that the Authority could have left the sentences stand at life imprisonment to begin with. As Judge Browning stated in his concurrence in *Sturm, supra:*

> Appellant may have no "right" to be imprisoned for less than his whole life; but he is entitled to have the time he must serve determined in a manner consistent with the Constitution. 395 F.2d at 450.

Indeed, the California Supreme Court itself has read into the indeterminate sentence statutes a requirement that the revocation and refixing of a sentence must be based on cause and cannot be based on whim or caprice. See *In re Schoengarth,* 66 Cal.2d 295, 57 Cal. Rptr. 600, 425 P.2d 200 (1967); *In re McClain,* 55 Cal.2d 78, 9 Cal. Rptr. 824, 357 P.2d 1086 (1960). Such a construction was clearly necessary to prevent the statutes being struck down as permitting arbitrary action limited by vague or nonexistent standards.

It follows from this that when the Adult Authority acted and revoked the two 5-year sentences it had previously set, due process required that there be some valid basis for its doing so. Certainly the very heart of due process is a prohibition against arbitrary acts whose effect is a denial of liberty. Again we quote Judge Browning:

> If, for example, appellant had alleged facts from which it appeared that the Adult Authority had increased the time he must actually serve from six to sixty years for a trivial infraction, or for no reason at all, it would surely be no answer to a due process challenge to say that since "all indeterminate sentences are for the maximum," and sixty years is less than life, the Authority's action redetermining the time appellant must actually serve could not be questioned. 395 F.2d at 450.

Only a few examples are necessary to demonstrate that there must be a valid reason for the respondent's revocation of the five-year terms it imposed on petitioner. It cannot be seriously questioned that if the Adult Authority acted in 1961 because petitioner had, since 1959, become a Baptist, a Unitarian, or a Black Muslim, the revocation could be challenged and set aside. Similarly, if it were shown that the Authority imposed far stricter rules of conduct on black or Mexican-American inmates than on whites and that this was the basis for the revocation, petitioner would surely be entitled to be released. Given then the rule that the Authority must not act arbitrarily or whimsically the question becomes whether there was any constitutionally adequate reason for its action here.

B. The Revocation of the Prior Order Setting a Sentence for No Reason or Because Petitioner Wished to Clear His Name Violated Due Process.

Since no response was filed in the lower courts the allegations of the petition for writ of habeas corpus must be taken as true here. Briefly summarized they establish that: (1) Petitioner was, at the time of the revocation, an honor prisoner with no violations of prison rules on his record for at least one year (A. 15). (2) On January 29, 1959, the Adult Authority was apparently fully satisfied with petitioner's prison record and his rehabilitation, and set his terms at the minimum, to expire on March 14, 1962. (3) On June 15, 1961, petitioner was asked what he would do when he was discharged in eight months. He said that he wished to go back to where he was convicted and to prove his innocence (A. 14-15). (4) Then and only then was there any mention of increasing his term. He was asked whether he had not admitted his guilt. Petitioner denied this, and rejected any extension of his term so that he could be on parole for a longer period (A. 15). Although members of the Authority admitted that he had "enough time in" they indicated that they wished to increase his sentence so that he could spend a longer time on parole and be kept "out of trouble," apparently by not being allowed to prove his innocence. (5) Subsequently, without giving notice of any reason or providing any further hearing, the Adult Authority revoked its order setting the two 5-year terms and has not reset any definite terms since.

On the basis of this record one of three conclusions may be drawn. First, the Adult Authority had no reason whatsoever for its action; second, the Authority revoked the 1959 order because petitioner claimed that he was innocent

of the crimes for which he was convicted and wished to clear his name after he was released; or third, the Authority had some reason that does not appear from this record but gave petitioner no notice of the reason and its alleged basis, gave him no opportunity to contest its basis or validity, and did not state the reason when it revoked its order.

For the reasons set out above, if the Adult Authority had no basis whatsoever for its action then it was necessarily arbitrary. Under the cases cited above it cannot stand since such arbitrary action would have been the result of "whim or caprice" (*Burns* v. *United States,* 287 U.S. 216, 223 (1932)), and would violate due process. This part of petitioner's brief will discuss whether the only reason for the revocation that appears on this record—petitioner's desire to clear his name—could be a valid basis for revocation of the 1959 order. The next part will deal with whether a revocation without a stated reason or opportunity to be heard violates due process.

Petitioner urges that his desire to prove his innocence of the crimes of which he was convicted could not constitutionally be the basis for the Authority's action. Therefore, the revocation was without proper cause but rather was arbitrary and capricious, in violation of his rights under the due process clause. The Authority has, by its action, essentially sought to exile him from his former home and to prevent him, evidently for the remainder of his life, from clearing his name.

However, the right to prove oneself innocent of a crime is certainly a fundamental constitutional right inherent in our notions of justice and implicit in our scheme of criminal

law. The presumption of innocence, the right to be tried openly and to confront one's accusers all serve to protect that right prior to trial and attest to its importance. Even after conviction a defendant cannot be forced to surrender that right. Miscarriages of justice have occurred too many times in the past to require an enumeration of examples. Moreover, the consequences of a conviction, particularly of a felony, continue even after final discharge from prison. See *Carafas* v. *LaVallee*, 391 U.S. 234 (1968). Therefore, to penalize a prisoner merely because he wishes to return to his home and the scene of his conviction to establish his innocence, and escape the onerous consequences of being a convicted felon, after he has been discharged conflicts with the most basic notions of liberty and justice.

The California Adult Authority, however, has done precisely this. When petitioner reasserted his innocence and announced his intention to try and clear his name it objected and told him that it wished to extend his term, put him on probation so that it could stop him. The Authority then revoked the terms it had fixed and in effect imposed additional punishment, which now has exceeded seven years, because he wishes to exercise a fundamental right.

Recent cases have struck down state practices which have denied probation or have inflicted additional terms of imprisonment because prisoners have sought to exercise analogous rights. Thus, in *Smartt* v. *Avery*, 370 F.2d 788 (6th Cir. 1967), the Sixth Circuit held unconstitutional a Tennessee prison rule that delayed consideration for parole for any prisoner that unsuccessfully sought review of his conviction by way of federal habeas corpus. The court held that the effect of the rule was to impose an unconstitutional condition on the exercise of a right protected by the

federal Constitution and laws. In *Patton* v. *North Carolina,* 381 F.2d 636 (4th Cir. 1967), the Fourth Circuit held unconstitutional the imposition of what was in effect a longer sentence by a state court on retrial following the vacating of the original conviction on federal habeas corpus. One ground of the decision was that the effect of the longer term was to place a burden on the exercise of a federal right. Similarly, this Court in *Green* v. *United States,* 355 U.S. 184, 193-194 (1957), held that the government could not condition the right to appeal on giving up the right to plead double jeopardy.[7]

The result of the Adult Authority's action in petitioner's case is virtually identical to that in *Smartt* v. *Avery.* There, felons serving sentences as a result of presumably valid convictions were denied parole because they sought to have their convictions reviewed by way of habeas corpus. Here, petitioner wished to vindicate his name by another means after his discharge from prison and after he had fully paid his debt to society. Arguably, the right to prove one's innocence after serving one's sentence is even more fundamental than the right to have a conviction overturned before the sentence has been completed. In *Smartt* it was held that to penalize a prisoner by delaying or denying probation for attempting to invalidate a sentence (which amounted to a denial of either guilt or liability for punishment) violated due process. Here, the same result must be reached since respondent is similarly punishing petitioner for wishing to do no more.

---

[7] And cf. *Springer* v. *United States,* 148 F.2d 411 (9th Cir. 1945), *Butler* v. *District of Columbia,* 346 F.2d 798 (D.C. Cir. 1965), which indicate that other conditions placed on probation are invalid.

Finally, this Court held last term that to threaten or impose greater punishment because a defendant insists on his innocence is to deny him basic constitutional rights. *United States* v. *Jackson,* 390 U.S. 570 (1968). In that decision the Court implicitly recognized that the right to maintain and to establish one's innocence is fundamental to any fair system of justice. Under *Jackson* petitioner could not, on conviction, have received a greater punishment because he would not admit guilt at his trial. Therefore, he cannot be punished simply because he will not admit guilt after conviction and because he wishes to exercise his right to clear his name through the only means now open to him.

Here, the State, after fixing a set term and admitting that petitioner had served enough time in prison, and in the face of his good prison record, has punished him solely for that reason. Such an unconscionable and unconstitutional action cannot be allowed to stand.

C. If the Adult Authority Revoked Petitioner's Two Prior Terms for a Reason of Which It Gave Him No Notice and No Opportunity to Be Heard, Petitioner Was Denied Due Process of Law.

Petitioner has shown that if the California indeterminate sentence law were construed to allow the revocation of an order fixing a term of years for no reason, it would be unconstitutional as vesting in the Adult Authority the power to act arbitrarily pursuant to vague or nonexistent standards. Similarly, it has been shown that if the Adult Authority revoked the terms it had set for the only reason apparent on this record it acted for an arbitrary and unconstitutional reason.

It might be contended, however, that there was some other, valid reason for the Adult Authority's action and that therefore the revocation was lawful. Petitioner contends, however, that any such reason, if it existed, was not communicated to him, nor was he given any opportunity to respond to it. In other words, before revocation can occur, notice of the reason for the action must be given and some kind of a hearing be afforded at which he may present his position.

It has been noted above that at one time there were requirements that a notice and hearing had to be given before a sentence could be redetermined and increased. However, the California Supreme Court has held that, even though good cause must exist for a redetermination (*In re Schoengarth,* 66 Cal.2d 295, 57 Cal. Rptr. 600, 425 P.2d 200 (1967)), notice and hearing was not required. The requirements were deleted from the statutes by the 1941 amendments described above and it was held that there is no constitutional mandate that notice and hearing be given. *In re McClain,* 55 Cal.2d 78, 9 Cal. Rptr. 824, 357 P.2d 1086 (1960).

Petitioner urges, however, that notice of a valid reason and a hearing are essential if the decisions of the Adult Authority are to be subject meaningfully to the requirements of due process. It is clear that the Authority cannot revoke a sentence for no reason at all, since such an action would be arbitrary and whimsical. Similarly, it cannot do so for a constitutionally invalid reason, *e.g.,* because of the religion or race of an inmate. It necessarily follows, therefore, that when the Authority does revoke a sentence it must at least grant the minimum protections of

due process, including notice of a valid reason and a hearing. Otherwise, it will be able to cloak arbitrary or wrongful action in a veil of silence. A prisoner faced with an action that would seriously deprive him of his liberty would be unable to show that it was wrongful unless he could find out and contest the ostensible reason.

The importance of notice and a hearing to prevent arbitrary action that would seriously impinge on liberty has been recognized in a variety of contexts. These include deportation proceedings (*Japanese Immigrant Case (Yamataya* v. *Fisher),* 189 U.S. 86; *Wong Yang Sun* v. *McGrath,* 339 U.S. 33, 49-51); the exclusion of a man claiming citizenship (*Chin Yow* v. *United States,* 208 U.S. 8); the discharge of a college professor for invoking the privilege against self-incrimination (*Slochower* v. *Board of Higher Education,* 350 U.S. 551); college disciplinary proceedings (*Dixon* v. *Alabama State Board of Higher Education,* 294 F.2d 150 (5th Cir. 1961)); and bar committee certification proceedings (*Willner* v. *Committee on Character & Fitness,* 373 U.S. 96). And recently this Court has recognized the importance of the requirements of notice and hearing in order to protect against unlawful, arbitrary, or mistaken agency action where the question was what procedural rights were to be afforded a public housing tenant prior to eviction. See *Thorpe* v. *Housing Authority of the City of Durham,* 393 U.S. 268, 283 (1969).

Certainly it cannot be denied that when a sentencing authority sets or revokes a sentence it takes an action that has grave consequences for the person involved. This Court therefore recognized the importance of ensuring that basic due process requirements be met in a sentencing proceeding in *Mempa* v. *Rhay,* 389 U.S. 128 (1967).

Mempa involved a parole revocation or deferred sentence proceeding which resulted in the petitioner being sent to prison under an indeterminate sentence law closely similar to California's. Although the issue in *Mempa* was the right to counsel, its implications with regard to other basic procedural rights in sentencing proceedings are obvious. The decision puts particular emphasis on the role of counsel in assuring that the facts and circumstances on which the sentence to be imposed is based are fully and correctly presented, and relies particularly on *Townsend* v. *Burke,* 334 U.S. 736 (1948). Just as the presence of counsel is essential to ensure that errors, either of fact or of law, are not made, equally or more important is the requirement that a prisoner be given notice of the reason for the proposed action and an opportunity to contest that basis. If the prisoner is not told why his sentence is to be revoked and is not given an opportunity to show why the actions should not take place he must remain subject to wrongful, arbitrary, or mistaken deprivations of his liberty.

Of interest in *Mempa* is the significance placed by this Court on the fact that when, under Washington law, the judge imposes the maximum sentence, he is required, together with the prosecutor, to furnish the Board of Prison Terms and Paroles with information about the circumstances of the crime and the character of the accused for its use in determining the actual sentence to be served. Even though the Board was not bound by the recommendations of the judge and prosecutor this Court found in the fact of its reliance on them a persuasive reason as to why counsel was needed in the proceeding where they were formulated. 389 U.S. at 135. Surely, if such procedural protections are necessary to ensure that the initial deter-

mination of the sentence is fair, it follows that when an agency revokes a sentence already set, it must provide some minimum of due process which must include at least notice and an opportunity to be heard.[8]

Notice of a valid reason, if any existed, was not given petitioner here. Nor was any opportunity to contest such a reason given. The proceeding on June 15, 1961, was not a hearing to revoke his sentence. Its purpose was to consider whether he should be paroled, and petitioner understood it as such. No mention or hint of a revocation occurred until petitioner expressed his desire to clear his name. It has been shown that that could not have been a valid reason for the Authority's action. If it had any other reason, due process, as *Mempa* demonstrates, required that it inform petitioner of it and give him an opportunity to state his case. This could have enabled him to marshal whatever relevant facts he had to enable the Authority to make a reasoned determination of an issue of the greatest moment to him—whether he was to gain his liberty.

II.

The Increase of Petitioner's Sentences Violated His Right Under the Fourteenth Amendment to Be Free of Double Jeopardy.

In Part I of this brief it has been assumed, solely for the sake of argument, that under some circumstances the Adult Authority might have the power to revoke sentences that it has fixed and increase them. In this part, on the other hand, petitioner contends that under well established principles

[8] Cf. *Hyser* v. *Reed*, 318 F.2d 225 (D.C. Cir. 1963).

of law the action of the sentencing authority in increasing the sentence imposed on petitioner in 1959 for whatever reason violated the protection against double jeopardy as it applies to the states by virtue of the due process clause of the Fourteenth Amendment. Here we first will show that petitioner has suffered double jeopardy, and second will discuss why the protection petitioner seeks is encompassed by the Fourteenth Amendment.

A. The Action of the Adult Authority Violated Long Standing Double Jeopardy Principles.

The decisions of this Court interpreting the double jeopardy clause of the Fifth Amendment have long made it clear that the protection it embodies is twofold. First, it protects against a criminal defendant being tried a second time after jeopardy has attached in the first trial. Secondly, it prohibits two punishments being inflicted as a result of one conviction. Thus, in *Ex parte Lange,* 85 U.S. 163 (1874), the trial court imposed two sentences on the petitioner, both a fine and imprisonment, although the applicable statute permitted only that either a fine *or* imprisonment be imposed. The petitioner paid the fine and, shortly after he began to serve the sentence, sought his release. The court then revoked the prior sentence and sentenced the petitioner to the full prison sentence only. This Court reversed, laying down the general rule stated above. It went on to indicate that once a sentence has begun to be served it cannot be augmented without double jeopardy being violated.

In *In re Benz,* 282 U.S. 304 (1931), this Court, although holding that a sentence could be reduced, said, relying on *Lange,* that it could not be augmented once the defendant had begun to serve it. The Court reaffirmed the principle

that the purpose of the double jeopardy clause was to prevent two punishments as much as to prevent two trials. To increase a sentence is to subject a defendant to such double punishment. 282 U.S. at 307. And, in *In re Bradley,* 318 U.S. 50 (1943), this Court again specifically followed *Lange* even though in *Bradley* the fine had not been paid into the treasury of the United States but could have been returned.[9]

The rule against increasing a sentence, validly imposed, after service of it has begun has been virtually universally followed by the circuit courts of appeals. Thus, in *Schultz* v. *United States,* 384 F.2d 374 (5th Cir. 1967), the district court had originally imposed a sentence that was to run concurrently with another. Subsequently, the court revised the sentence so that it would run consecutively with the prior sentence. The Fifth Circuit held that the effect of this order was to increase the second sentence after the defendant had begun to serve it, in violation of the guarantee against double jeopardy.

The rule thus enunciated has been strictly applied even where it is arguable that an error was made when the initial sentence was imposed by the trial judge. In *United States* v. *Sacco,* 367 F.2d 368 (2nd Cir. 1966), the defendant was convicted on two counts, the first permitted a maximum sentence of ten years and the second a maximum of five. However, the trial court sentenced him to five years on the first count and seven years on the second, in

---

[9] *Bozza* v. *United States,* 330 U.S. 160 (1947), does not in any way undermine the principle established by *In re Lange* and *In re Benz.* There the judge failed, through inadvertence, to impose the fine and imprisonment specifically mandated by statute. The error was corrected within five hours and the required fine imposed.

excess of that legally permissible. Subsequently, the defendant moved to have the second sentence corrected. However, on the government's cross motion, the court revised the sentence, imposing seven years for the first count, well within the statutory maximum, and five on the second. The Second Circuit reversed, relying on *Lange*, *Benz*, and *Bradley*. The defendant had begun to serve the original five-year sentence imposed on count one; to increase it resulted in inflicting a second punishment, *i.e.*, an additional two years, for the same offense.

Other circuits have followed the same rule. See *Kennedy* v. *United States*, 330 F.2d 26 (9th Cir. 1964) (cannot change concurrent sentences to consecutive ones once they have been begun to be served); *United States* v. *Adams*, 362 F.2d 210 (6th Cir. 1966) (cannot vacate legal sentence, impose a more severe one); *Duggins* v. *United States*, 240 F.2d 479 (6th Cir. 1957); *Patton* v. *North Carolina*, 381 F.2d 636 (4th Cir. 1967); *Exberg* v. *United States*, 167 F.2d 380 (1st Cir. 1948).[10] In these cases the same basic factors were present. (1) The sentencing authority imposed a sentence less than the maximum permissible under statute; (2) the sentence imposed was lawful; (3) the defendant had begun

---

[10] Virtually the only court of appeals case contra was *Phillips* v. *Biddle*, 15 F.2d 40 (8th Cir. 1926). But in *Oxman* v. *United States*, 148 F.2d 750, 753, the Eighth Circuit said:

> . . . in criminal cases a sentence "already partly suffered cannot be increased." . . . The reason for the limitation is that to increase the sentence after it has been served in part, subjects the defendant to double punishment for the same offense in violation of the 5th Amendment to the Constitution, which provides that no person shall "be subject for the same offense to be twice put in jeopardy for life or limb." A sentence may be reduced after it has been partly served, but it may not be augmented. *It is not a jurisdictional but a Constitutional question.* (Emphasis added.)

to serve the sentence. In most of the cases it was reasonably clear that the sentencing authority had committed an error, often of an administrative kind. Thus, for example, in *Sacco* it could be reasonably inferred that the judge meant originally to sentence the defendant for seven years on the count which permitted such a term; he probably had no intention to sentence him to seven years on a count that allowed only a five-year maximum.

The rationale and necessity for the rule enunciated in *Lange* and *Benz* and applied by the above courts can be shown by the following example. Assume that a defendant were convicted under a statute which permitted a maximum sentence of ten years. The sentencing authority sentenced him to five years. The defendant served the five years and was discharged. One day after his discharge he was recalled by the sentencing authority, whether a court or another tribunal, and was informed that it was felt that additional time in prison was necessary (perhaps because the defendant had stated, after release, that he wished to clear his name). The judge or authority then sentenced him to an additional two years, well within the maximum that he could have been sentenced in the first instance. Unquestionably such action would do exactly what the double jeopardy clause seeks to prevent—it would punish the defendant twice for the same crime.

It follows that no constitutionally relevant distinction can be drawn between the case so described and one where one day *before* the defendant's discharge from the five-year term the sentencing authority imposed an additional two-year sentence. The effect would be identical; in both instances the defendant would serve two sentences and would receive two punishments, the original five-year term and the

subsequent two-year one. It has been in recognition of the identity of the two cases for double jeopardy purposes that the decisions have enunciated the rule that a valid sentence once imposed and once begun to be served may not constitutionally be increased.

Applying this rule to the present case it can be seen that it clearly governs and that petitioner's rights to be free of double jeopardy have been violated. It has been shown above that for constitutional purposes the Adult Authority exercised the actual sentencing power in petitioner's case, particularly in light of his being convicted of a crime for which no maximum term was fixed by statute. In 1959, when it fixed his sentences at two consecutive five-year terms the Authority did precisely what the trial courts did in all of the cases cited above. It sentenced petitioner to a fixed definite term of years within the statutory maximum allowable.

Further, there is no question that petitioner had commenced to serve both terms at the time the Authority revoked the definite terms and increased his sentences. The first five-year term ended in March 1957. Nevertheless, the Authority purportedly increased a sentence already completed potentially back to life imprisonment. This action clearly inflicted double punishment for one of the two crimes for which petitioner was convicted. Petitioner therefore began to serve the second five-year term in 1957, and had only eight months left to serve when the Adult Authority revoked its prior order and increased the sentence. Petitioner, of course, has so far served over seven years more than the five-year sentence that the Authority first set.

To summarize, just as in the cases cited, the sentencing authority here fixed two definite terms. Petitioner served

all of one and all but eight months of the second. Just as in the above cases, the sentencing authority increased the definite terms set to terms within the maximum authorized by statute. However, unlike even the other cases, the first sentence imposed was not the result of an error, clerical or otherwise. Therefore, under a long established and nearly universally accepted rule of constitutional law, petitioner has been subjected to double punishment for the same convictions in violation of his right to be free of double jeopardy.

B. The Rule Against Double Punishment Applies to Petitioner's Case Through the Due Process Clause of the Fourteenth Amendment.

Decisions of this Court, while not yet holding that the Fifth Amendment's prohibition against double jeopardy applies specifically to the states,[11] have indicated that at least certain aspects of double jeopardy may apply by virtue of the due process clause of the Fourteenth Amendment. Thus, in the leading case of *Palko* v. *Connecticut,* 302 U.S. 319, 328 (1937), the Court suggested that certain kinds of double jeopardy might subject a defendant to "a hardship so acute and shocking that our policy will not endure it," and would "violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" Cf. also *Bartkus* v. *Illinois,* 359 U.S. 121 (1959); *Brock* v. *North Carolina,* 344 U.S. 424 (1953).

---

[11] This brief was prepared prior to any decision by this Court in *Benton* v. *Maryland,* Oct. Term 1968, No. 201, in which the issue of incorporation of the double jeopardy clause into the Fourteenth Amendment has been raised.

Relying on this language two circuit courts in recent years have found that the due process double jeopardy standard has been violated in state cases. Thus, in *Hetenyi* v. *Wilkins,* 348 F.2d 844 (2nd Cir. 1965), the court held that at least the basic core of double jeopardy was incorporated. And, in *Patton* v. *North Carolina,* 381 F.2d 636 (4th Cir. 1967), the Fourth Circuit, in following *Hetenyi,* held that one of the fundamental principles of double jeopardy applicable to the states is the one involved here, viz., the rule against an increase of a sentence after it had begun to be served.

In so holding, *Patton* found particularly persuasive language in *Ex parte Lange, supra,* where this Court held that:

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. 85 U.S. at 168.

The basic and fundamental nature of the right involved here is demonstrated not only by the words of *Lange,* but also by the uniformity with which the rule has been applied by the United States circuit courts. As has been shown above, it has been adopted and enforced in the First, Second, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits over a long period of time. In enforcing the rule those courts have relied not only on the decisions of this Court in *Lange* and *Benz,* but also have pointed out that it has long been a fundamental and necessary component of the principle of double jeopardy.[12]

---

[12] For this reason, the rule involved here is far different from some of the technical issues involved in double jeopardy questions, *e.g.,* as to precisely when jeopardy attaches at a trial.

Thus, the overwhelming weight of opinion in the federal courts establishes that the standard of *Palko* has been met as the Fourth Circuit held in *Patton*. The conclusion is inescapable that to permit the increase of a sentence once a defendant has begun to serve a fixed and definite term would indeed violate one of the "fundamental principles of liberty and justice that lie at the base of all our civil and political institutions."

Conclusion

For the foregoing reasons, the judgments below denying a certificate of probable cause and a writ of habeas corpus should be reversed.

Respectfully submitted,

CHARLES STEPHEN RALSTON
1095 Market St.
San Francisco, California 94103
Attorney for Petitioner